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Letter Ruling 08-1: Foreign LLC treated as a disregarded entity for Massachusetts Tax Purposes

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February 1, 2008

You request a letter ruling on behalf of ***** ("Purchaser") and ***** , an Indian private limited company ("IPL"), that (1) IPL will be treated as a foreign limited liability company ("foreign LLC") for certain Massachusetts tax purposes (specifically for purposes of G.L. c. 62, § 17 and G.L. c. 63, § 30.2), and (2) as a foreign LLC, IPL will be treated as a disregarded entity and not as a foreign corporation for such Massachusetts tax purposes if it is so treated for federal income tax purposes.

I. Facts

Purchaser is a limited liability company organized under the law of Delaware with a principal place of business at ***** , Boston, Massachusetts. Purchaser is classified as a partnership for federal income tax purposes. IPL is a private limited company organized under the law of India (the Companies Act, 1956) that you state does not have any presence in Massachusetts.

Purchaser is contemplating acquiring the shares of IPL. The acquisition would result in sole ownership of IPL by Purchaser. If Purchaser acquires IPL, IPL would elect to be treated as a disregarded entity for federal income tax purposes.

The Indian Companies Act, 1956

The Companies Act, 1956 ("Act") is the basic law governing the creation, continuation, and winding up of companies in the Republic of India. Additionally, the Act governs the relationships between shareholders, companies, the public, and the government. Act, Preamble.

Under the Act, a "limited company" is defined as a company limited by shares or by guarantee. *Id.* at § 2(23). A "private company" means a company that, by its articles, (1) restricts the right to transfer its shares, if any; (2) limits the number of its members to fifty; and (3) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company. *Id.* at § 2A,3(2)(iii).

Under the Act it is stated that

. . . where the company to be formed will be a private company . . . (2) [s]uch a company may be either –

(a) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in the Act termed ‘a company limited by shares’);

(b) a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up (in the Act termed ‘a company limited by guarantee’); or

(c) a company not having any limit on the liability of its members (in the Act termed ‘an unlimited company’).

Id. at § 12(1) and (2)(a)-(c).

Under the Act, the Memorandum of Association (“Memorandum”) of every company must state the name of the company with “Private Limited” as the last words of the name in the case of a private limited company. *Id.* at § 13(1)(a). Moreover, the Memorandum of a company limited by shares or by guarantee must state that the liability of its members is limited. *Id.* at § 13(2).

IPL’s Memorandum and Articles of Association

IPL, pursuant to its Memorandum, dated January 31, 2005, is a private company limited by shares. In § IV. of its Memorandum it is stated that the liability of IPL’s members is limited. In § 3.c. of IPL’s Articles of Association, dated January 31, 2005, it is stated that the number of IPL’s members is limited to fifty.

II. Discussion

A. Ruling 1

Every foreign corporation doing business in Massachusetts is subject to the corporate excise on its own account. See G.L. c. 63, § 39. The term “foreign corporation” includes every corporation, association, or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under [the Massachusetts General Laws] which has privileges, powers, rights or immunities not possessed by individuals or partnerships. . . .” G.L. c. 63, § 30.2. The term “foreign corporation” does not apply to a foreign limited liability company, as defined in G.L. c. 156C, § 2, that has more than one member and is classified for the taxable year as a partnership for federal income tax purposes. *Id.* [\[1\]](#) Additionally, the term “foreign corporation” does not apply to a foreign limited liability company, as defined in G.L. c. 156C, § 2, that has only one member and makes a federal election to be disregarded as an entity separate from its sole member and has, as its sole member, a foreign corporation that is not a federal S corporation, as defined in IRC § 1361, as amended and in effect for the taxable year. *Id.* [\[2\]](#)

The Massachusetts Limited Liability Company Act, G.L. c. 156C, defines a “foreign limited liability company” as “a limited liability company formed under the laws of any state other than the commonwealth or under the laws of any foreign country or other foreign jurisdiction and denominated as such under the laws of such state or foreign country or other foreign jurisdiction.” G.L. c. 156C, § 2(4). The Department of Revenue (“DOR”) has taken the position that the G.L. c. 156C, § 2 definition of a foreign limited liability company “gives a great deal of weight to what the business

organization law of another jurisdiction calls an entity.” DD 01-8. However, the label given to an entity by foreign law is not determinative. To provide guidance in determining whether a foreign entity is, or is not, a “foreign LLC” for Massachusetts tax purposes, DD 01-8 lists three attributes that “suggest . . . (but are by no means determinative)” that an entity is a foreign LLC. These attributes are that the entity: (1) use a name ending with the designation “limited,” “ltd.,” or other foreign equivalent; (2) not issue shares/certificates of ownership; and (3) limit the number of its shareholders/members. As a threshold matter, DD 01-8 states that “any non-U.S. business entity appearing on the list of foreign corporations defined as a corporation for federal tax purposes at [Treas. Reg.] §301.7701-2(b)(8) [so-called “*per se* corporations] will not be classified as a foreign LLC.” Additionally, DD 01-8 names nine non-US business entities that DOR will generally classify as foreign LLCs.

In determining whether IPL is a foreign LLC for Massachusetts tax purposes based on the criteria above, we note from the Facts that IPL is a private limited company organized under the Act. Under the Act, a “private limited company” is a company limited by shares or by guarantee that, by its articles, (1) restricts the right to transfer its shares, if any; (2) limits the number of its members to fifty; and (3) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company. Act, § 2(23); § 2A,3(2)(iii). Under the Act, the Memorandum of every company must state the name of the company with “Private Limited” as the last words of the name in the case of a private limited company. *Id.* at § 13(1)(a). Moreover, the Memorandum of a private limited company must state that the liability of its members is limited. *Id.* at § 13(2). In this case, the Memorandum of IPL specifically states that IPL is a private company limited by shares. Clearly, under the Act, a “private limited company” with the liability of its members limited by shares is a company with limited liability under the laws of India.

In addition, we note from the Facts that IPL has two of the three attributes listed in DD 01-8 that suggest that an entity is a foreign LLC. IPL’s name ends with the words “Private Limited.” Also, in IPL’s Articles of Association it is stated that the number of IPL’s members is limited to fifty. Finally, we note that IPL does not appear on the list of foreign corporations defined as a *per se* corporation for federal tax purposes at Treas. Reg. §301.7701-2(b)(8), and that the liability of IPL’s members is limited by shares.^[3]

Given that IPL is a “private limited company” under the Act with liability of its members limited by shares for purposes of Indian law, coupled with the fact that IPL has two of the three attributes listed in DD 01-8 and the fact that IPL does not appear on the list of foreign corporations classified as *per se* corporations for federal income tax purposes at Treas. Reg. § 301.7701-2(b)(8), we rule that IPL is a foreign LLC for Massachusetts tax purposes, not a foreign corporation. That IPL issues shares is not a disqualifying fact. While the three attributes listed in DD 01-8 suggest that an entity is a foreign LLC for Massachusetts tax purposes, they are not determinative and the presence of all three attributes is not required in every case.

B. Ruling 2

Pursuant to Treas. Reg. § 301.7701, the federal check-the-box regulation, every unincorporated business entity that is not properly classified as a trust or expressly taxed as a corporation under the Internal Revenue Code may elect how it is to be classified and taxed for federal tax purposes. Under the federal check-the-box rules, single-member unincorporated business entities may elect either to be taxed as corporations or to be disregarded as entities separate from their owners, in which case they will be treated as a sole proprietorship, branch, or division of the owner. Unincorporated business entities with two members or more may elect to be taxed as partnerships or as corporations.

With one exception (see footnote 2), Massachusetts follows the federal classification of foreign LLCs under the federal check-the-box regulation. Under G.L. c. 63, § 30.2, for example, it is expressly stated that a foreign LLC, having as its sole member a foreign corporation that is not an S corporation for federal tax purposes, will be disregarded as an entity separate from its owner for Massachusetts tax purposes if it so disregarded for federal tax purposes. *See also* TIR 97-8, LR 00-11, and DD 01-8.

In determining how IPL would be classified for Massachusetts tax purposes if Purchaser acquired

IPL, we note from the Facts that the acquisition would result in sole ownership of IPL by Purchaser, which is classified as a partnership, and is not eligible to be treated as an S corporation for federal income tax purposes. Accordingly, we rule that IPL will be treated as a disregarded entity for Massachusetts tax purposes if it is so treated for federal income tax purposes.

III. Conclusions

Ruling 1: IPL will be treated as a foreign LLC for Massachusetts tax purposes under G.L. c. 62, § 17 and G.L. c. 63, § 30.2.

Ruling 2: As a foreign LLC, IPL will be treated as a disregarded entity for Massachusetts tax purposes under G.L. c. 62, § 17 and G.L. c. 63, § 30.2, if it is so treated as a disregarded entity for federal income tax purposes.

It is a condition to these rulings that all actions and all tax filings, reports, etc. of Purchaser, IPL, and all related parties are performed in a manner fully consistent with the treatment provided by these rulings and the underlying facts and law as represented and described above.

Very truly yours,

/s/Henry Dormitzer

Henry Dormitzer
Commissioner of Revenue

HD:MTF:pls

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[\[1\]](#)Section 17 of G.L. c. 62 provides that if a limited liability company (which for this purpose includes a foreign limited liability company) has only one member and is not treated as a separate taxable entity for federal income tax purposes, the LLC is not separately taxed (i.e., it is disregarded as an entity) and such member shall include the LLC's income, loss, deductions, and credits in the member's return.

[\[2\]](#)A foreign LLC that has only one member and makes a federal election to be disregarded as an entity separate from its sole member and has, as its sole member, an S corporation for federal income tax purposes, will be separately taxed under G.L. c. 63, as applicable, as a foreign S corporation. G.L. c. 63, § 30.2

[\[3\]](#) We do not address here the treatment of an Indian private company "limited by guarantee."